

FACTUAL HISTORY

On January 31, 2013 appellant, then a 47-year-old supervisor air traffic control specialist, filed an occupational disease claim alleging that on September 16, 2012 he first realized that his post-traumatic stress disorder had been aggravated by his excessive workload and stress from his work duties.² He submitted a report from Dr. Naomi I. Jacobs, a licensed clinical psychologist, who noted appellant's concern of Hispanic hostility and attempts to fire him. Dr. Jacobs specifically noted an event on June 5, 2012. She determined that appellant suffered from an aggravation of post-traumatic disorder stemming originally from the June 5, 2012 incident.

By correspondence dated April 12, 2013, OWCP informed appellant that the evidence of record was insufficient to establish his claim. Appellant was advised as to the medical and factual evidence required to support his emotional condition claim. OWCP gave him 30 days to provide this information.

In response to OWCP's request, appellant submitted medical and factual evidence.

In a July 3, 2012 statement for his CA-1 form, appellant discussed the June 5, 2012 incident. Rick Garreau, manager, and Robert Christian, security officer, entered his office to confiscate his computer. Appellant was told to not touch anything and back away from the computer. He was given no reason for the confiscation of his computer even after asking why this occurred, nor was he even allowed to copy files or work. As a result of this incident, appellant alleged that he was humiliated and that his peers questioned his integrity and truthfulness.

Appellant believed that on December 16, 2011 Richard Belmonte, the manager at the regional office, with no investigation, had ordered his bosses to fire him, which they refused to do without grounds or investigation. He alleged that, since his computer was confiscated, he has lost credibility as a manager and is "questioned like a criminal." Appellant also alleged that since June 5, 2012 he has suffered from headaches and stress. He believed there was a hostile work environment for Hispanics. Appellant alleged retaliation as he is "a lead member" of the group of Hispanic managers. He alleged that the June 5, 2012 incident was "a direct attack on my credibility as a manager and person."

An undated and unsigned statement from Jose Garcia, appellant's first-line manager, confirmed these actions occurred and noted that Mr. Belmont had initiated these actions. He also noted a Hispanic harassment.

In an August 15, 2012 statement, appellant noted that he finally learned that his computer had been confiscated because there had been an allegation that he was running a personal business from his work computer. He stated that he felt angry and stressed when the security investigator came to question him unexpectedly. According to appellant, he had no time to call an attorney or otherwise prepare for the questioning by the security investigator. He related that he was questioned about owning a business. Appellant stated that he could not understand why the employing establishment did not simply verify whether a business existed in his name instead

² Appellant stopped work on September 24, 2012.

of allowing his computer to be taken. He alleged that the investigation verified that he had done nothing wrong, and in his opinion was wasteful and harassing, was a planned attack to cause him pain and to harass Hispanics in management. Appellant stated that he refused to provide his eBay username and denied owning a business, being a car dealer or being licensed. He stated that he felt that requesting his eBay user name was a violation of his privacy which was why he refused to provide it to the investigator. Appellant alleged harassment due to the investigator requesting that he attest that he provided truthful information when he was not advised that he was being under oath regarding his statements. In concluding, he alleged that he had been harassed everyday “with no justification or understanding” and that this was an organized effort to eliminate Hispanics from management at the employing establishment.

On April 15, 2013 OWCP received an undated statement from appellant detailing the employment factors he believed contributed to his condition including a history. Appellant stated that on September 16, 2012 he suffered an anxiety attack and severe headache due to the increased complexities of the air traffic. He stated that he began to question whether the decisions he made were erroneous and based on fear. Appellant alleged that his work stress caused his headaches. He stated that he was the overseeing manager for the Traffic Management Unit and that he was “responsible for managing all air traffic traversing the air traffic control facility. On September 16, 2012 appellant was responsible for directing the route approvals and amendments as well as tactical plans for the management of all traffic on my shift. The responsibility from this caused his headache and anxiety attack. Appellant alleged that as a result of his anxiety he “could not think clearly nor make sound operational decisions.” He came to the realization that he could not finish the shift and could not return the next day. Appellant has not returned to the position since September 24, 2012.

In an undated report, Dr. Kristina F. DeMatas, a treating Board-certified family medicine practitioner, reported that appellant was seen for his annual examination. Appellant related that his computer had been confiscated on June 5, 2012 and that he had been accused of running a business at work. He stated that the accusation was untrue and he was experiencing a lot of stress due to the investigation, answering questions about the investigation and defending himself. In June 2012, appellant noted that he began having moderate-to-severe headaches at work which coincided with the confiscation of his computer and resulting investigation. Dr. DeMatas provided physical examination findings and medical history. She diagnosed a tension-type headache and stress-related anxiety versus adjustment disorder. Dr. DeMatas attributed appellant’s condition to a stressful work environment.

In a follow-up visit on October 3, 2012, Dr. DeMatas related that over the past four months appellant has experienced severe headaches at work one to two days per week. She indicated that since September 24, 2012 he has been off work. Appellant related that his headaches were better when he was not working. He requested a note to justify his time off from work.

In an October 22, 2012 note, Dr. Monique Bosque-Perez, a treating osteopath, opined that appellant’s anxiety and headaches “may be directly related and exacerbated by his stressful” air traffic control employment. She indicated that he was totally disabled until he can get these conditions under control.

Robin Badger, an air traffic control manager, reviewed appellant's report of investigation and advised the employing establishment's labor and employee relations specialist that appellant had denied everything in his statement but there was evidence that he was selling cars on eBay. She noted his hard drive showed over 1,200 photographs of cars, there were 89,893 hits on his personal website and 424,779 hits on his personal e-mail account. Based on this evidence, Ms. Badger concluded that there was more than incidental use and provided recommendations for discipline.

In a November 14, 2012 report, Dr. Jacobs, a licensed clinical psychologist, reported meeting appellant for an evaluation on November 12, 2012. She opined that his post-traumatic stress disorder had been aggravated by a hostile work environment and discrimination towards Hispanics.

In a May 8, 2013 report, Dr. Jacobs diagnosed post-traumatic stress disorder, anxiety and stress headaches due to a hostile and threatening work environment. The threatening work environment included incidents of harassment and bullying towards Hispanics, the attempt by Mr. Belmont to terminate appellant's employment, the confiscation of appellant's computer on June 5, 2012, his feeling of humiliation because of the confiscation, his feeling of being disrespected in the control room, being interrogated on August 15, 2012 with no prior notice or opportunity to have an attorney present. On September 16, 2012 appellant alleged that he felt unable to perform his job duties "due to a significant loss of self-confidence, shame, poor concentration, severe anxiety and headaches." In concluding, Dr. Jacobs stated that appellant has suffered from post-traumatic stress disorder since June 5, 2012 and that the condition has been aggravated by his attempts to perform his job duties.

On May 6, 2013 appellant provided information to support his argument regarding a hostile work environment by noting the lack of Hispanics hired at the employing establishment and Hispanic inclusion in management.

Dr. Jacobs, in a May 8, 2013 Work Capacity Evaluation Psychiatric/Psychological Conditions (Form OWCP-5a), indicated that appellant was totally disabled from working due to his psychiatric condition. He stated that appellant's post-traumatic stress disorder was aggravated by his work at the employing establishment. Symptoms of appellant's condition included hypervigilance, high anxiety, loss of confidence, headaches, poor concentration, shame and intrusive memories. Dr. Jacobs opined that the symptoms were "too severe and easily triggered by stimuli associated with" appellant's work.

In a May 21, 2013 memorandum, Ms. Badger responded to appellant's occupational disease claim. She challenged the claim for benefits. Ms. Badger stated that on July 18, 2010 appellant had received a temporary promotion where his responsibilities included directing and planning operations in the Traffic Management Unit and providing first-line supervision to supervisors on the floor, supervisory coordinators in the traffic management unit and second-line supervision to traffic management coordinator and air traffic control specialists. Appellant's position was made permanent on July 17, 2011. Ms. Badger stated that no changes were made in either appellant's workload or position description from his temporary appointment on July 18, 2010 until he stopped working on September 24, 2012 nor was he assigned any additional duties or more complex work. She noted that there had been an investigation in January 2012 into

allegations of discrimination and as a result of the investigation there was one reassignment. Actions were taken to ensure a workplace free of discrimination. With respect to the June 5, 2012 computer confiscation incident, Ms. Badger noted that it occurred as the result of a hotline complaint that appellant “was using his FAA [Federal Aviation Administration] computer to conduct personal business.” She stated that the investigation and scanning of his computer revealed violations of the Agency’s Standards of Conduct, but that no disciplinary action had been taken against him as a result of these violations due to his decision to retire. Ms. Badger also noted that the person who would have prepared the disciplinary action was out for several weeks due to an accident. She claimed that appellant’s claim for wage-loss compensation was based solely on his reaction to administrative actions and therefore not compensable.

Ms. Badger sent appellant a letter dated October 24, 2012, requesting medical documentation for his absence from work. The letter advised appellant that a failure to provide the documentation would result in being charged as absent without leave. Appellant responded to Ms. Badger’s letter on October 24, 2013 explaining his absence and provided dates of his doctor appointments.

By decision dated June 25, 2013, OWCP denied appellant’s claim because he had failed to establish any compensable factors of employment.

Subsequent to that decision, OWCP received a copy of a September 25, 2012 e-mail from appellant to Ms. Badger regarding his inability to work and Ms. Badger’s response. Appellant related that he has had more consistent and increased anxiety and headaches, which improves when he is not at work. He alleged that nothing was being done to stop the harassment which is why his absence from work is indefinite.

Ms. Badger stated that she did not condone unprofessional behavior such as harassment in the workplace, but that appellant should provide specifics regarding the alleged behavior/actions, nature of behavior/action and individuals involved in the alleged inappropriate behavior.

On July 11, 2013 appellant requested a review of the written record by an OWCP hearing representative.

By decision dated November 13, 2013, an OWCP hearing representative affirmed the denial of appellant’s claim.³

LEGAL PRECEDENT

To establish a claim that he or she sustained an emotional condition in the performance of duty, an employee must submit the following: (1) medical evidence establishing that he or she has an emotional or psychiatric disorder; (2) factual evidence identifying employment factors or

³ OWCP’s hearing representative noted that appellant had filed two previous claims for stress and post-traumatic stress. She noted that under OWCP File No. xxxxxx327 appellant alleged stress due to overwork with an injury date of May 26, 2000. Under OWCP File No. xxxxxx656 appellant alleged post-traumatic stress disorder due to an excessive workload with an injury date of June 5, 2012. Neither claim has been accepted by OWCP.

incidents alleged to have caused or contributed to his or her condition; and (3) rationalized medical opinion evidence establishing that the identified compensable employment factors are causally related to his or her emotional condition.⁴

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment.⁵ There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation.⁶ Where the disability results from an employee's emotional reaction to his or her regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of FECA.⁷ On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his or her frustration from not being permitted to work in a particular environment or to hold a particular position.⁸

Administrative and personnel matters, although generally related to the employee's employment, are administrative functions of the employer rather than the regular or specially assigned work duties of the employee and are not covered under FECA.⁹ However, the Board has held that, where the evidence establishes error or abuse on the part of the employing establishment in what would otherwise be an administrative matter, coverage will be afforded.¹⁰ In determining whether the employing establishment has erred or acted abusively, the Board will examine the factual evidence of record to determine whether the employing establishment acted reasonably.¹¹

The Board has held that the manner in which a supervisor exercises his or her discretion falls outside the coverage of FECA. This principal recognizes that a supervisor or manager must be allowed to perform their duties and that employee's will, at times, disagree with actions taken. Mere disagreement with or dislike of actions taken by a supervisor or manager will not be compensable absent evidence establishing error or abuse.¹² Although the handling of leave

⁴ *V.W.*, 58 ECAB 428 (2007); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

⁵ *L.D.*, 58 ECAB 344 (2007); *Robert Breeden*, 57 ECAB 622 (2006).

⁶ *A.K.*, 58 ECAB 119 (2006); *David Apgar*, 57 ECAB 137 (2005).

⁷ 5 U.S.C. §§ 8101-8193; *Trudy A. Scott*, 52 ECAB 309 (2001); *Lillian Cutler*, 28 ECAB 125 (1976).

⁸ *J.F.*, 59 ECAB 331 (2008); *Gregorio E. Conde*, 52 ECAB 410 (2001).

⁹ See *Matilda R. Wyatt*, 52 ECAB 421 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 556 (1991).

¹⁰ See *William H. Fortner*, 49 ECAB 324 (1998).

¹¹ *Ruth S. Johnson*, 46 ECAB 237 (1994).

¹² *S.M.*, Docket No. 09-2290 (issued July 12, 2010); *Linda J. Edwards-Delgado*, 55 ECAB 401 (2004).

requests and attendance matters are generally related to employment, they are administrative matters and not a duty of the employee.¹³

For harassment or discrimination to give rise to a compensable disability, there must be evidence which establishes that the acts alleged or implicated by the employee did, in fact, occur.¹⁴ Mere perceptions of harassment or discrimination are not compensable under FECA.¹⁵ A claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence.¹⁶ Unsubstantiated allegations of harassment or discrimination are not determinative of whether such harassment or discrimination occurred.¹⁷ A claimant must establish a factual basis for his or her allegations of harassment or discrimination with probative and reliable evidence.¹⁸

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, OWCP, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.¹⁹ If a claimant does implicate a factor of employment, OWCP should then determine whether the evidence of record substantiates that factor.²⁰ When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, OWCP must base its decision on an analysis of the medical evidence.²¹

ANALYSIS

Appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. OWCP denied his emotional condition claim for failing to establish any compensable work factors. The Board must, therefore, initially review whether these alleged incidents and conditions of employment are covered employment factors under FECA.

¹³ *C.T.*, Docket No. 08-2160 (issued May 7, 2009); *Jeral R. Gray*, 57 ECAB 611 (2006).

¹⁴ *K.W.*, 59 ECAB 271 (2007); *Robert Breeden*, *supra* note 5.

¹⁵ *M.D.*, 59 ECAB 211 (2007); *Robert Breeden*, *supra* note 5.

¹⁶ *J.F.*, *supra* note 8; *Robert Breeden*, *supra* note 5.

¹⁷ *G.S.*, Docket No. 09-764 (issued December 18, 2009); *Ronald K. Jablanski*, 56 ECAB 616 (2005); *Penelope C. Owens*, 54 ECAB 684 (2003).

¹⁸ *Robert Breeden*; *supra* note 5; *Beverly R. Jones*, 55 ECAB 411 (2004).

¹⁹ *D.L.*, 58 ECAB 217 (2006); *Jeral R. Gray*, *supra* note 13.

²⁰ *K.W.*, *supra* note 14; *David C. Lindsey, Jr.*, 56 ECAB 263 (2005).

²¹ *Robert Breeden*, *supra* note 5.

Appellant contended that he was subjected to harassment and discrimination due to his Hispanic origin. Actions of a claimant's supervisor which the claimant characterizes as harassment may constitute a compensable factor of employment. However, for harassment to give rise to a compensable disability under FECA, there must be evidence that harassment or discrimination did occur. Mere perceptions or feelings of harassment do not constitute a compensable factor of employment.²² An employee's allegations that he or she was harassed or discriminated against is not determinative of whether or not harassment or discrimination occurred.²³ To establish entitlement to benefits, a claimant must establish a factual basis for his or her claim by supporting his or her allegations with probative and reliable evidence.²⁴

Appellant failed to establish that his supervisors or coworkers threatened or verbally abused him based on his race, religion or ethnicity. He only provided general allegations of harassment or discrimination based on his being Hispanic. None of appellant's statements provide details regarding specific instances or allegations of discrimination. He also alleged a hostile work environment based on the low number of Hispanics hired at the employing establishment and Hispanic inclusion in management. The record contains allegations that the employing establishment discriminated against Hispanics but no details were provided regarding any specific incidents involving appellant or any other Hispanic employee. The employing establishment acknowledged previous allegations of discrimination where one person was reassigned but provided no further information. Appellant did not provide evidence to substantiate his allegations of harassment, discrimination or a hostile work environment.²⁵ Accordingly, he has not established his allegations that he was harassed, mistreated, verbally abused or discriminated against by his supervisors or coworkers.

Appellant contended that management engaged in an improper investigation by removing his government computer and by conducting an interrogation on August 15, 2012. Although the handling of disciplinary actions and internal investigations are generally related to the employment, they are administrative functions of the employer and not duties of the employee.²⁶ In *Thomas D. McEuen*,²⁷ the Board held that an employee's emotional reaction to administrative or personnel matters taken by the employing establishment is not covered under FECA as such matters pertain to procedures and requirements of the employer and do not bear a direct relation of the work required of the employee. The Board noted, however, that coverage under FECA would attach if the factual circumstances regarding the administrative or personnel action established error or abuse by the employing establishment supervisor in dealing with the claimant. Absent such evidence of error or abuse, the resulting emotional condition must be

²² *G.S.*, *supra* note 17; *J.C.*, 58 ECAB 594 (2007); *Robert G. Burns*, 57 ECAB 657 (2006).

²³ *See C.T.*, Docket No. 08-216 (issued May 7, 2009); *K.W.*, *supra* note 14; *Ronald K. Jablanski*, *supra* note 17.

²⁴ *See G.S.*, *supra* note 17; *C.S.*, 58 ECAB 137 (2006); *Frankie McDowell*, 44 ECAB 522 (1993); *Ruthie M. Evans*, 41 ECAB 416 (1990).

²⁵ *See G.S.*, *supra* note 17; *Joel Parker, Sr.*, 43 ECAB 220 (1991) (the Board held that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

²⁶ *J.F.*, *supra* note 8; *Jeral R. Gray*, *supra* note 13; *Jimmy B. Copeland*, 43 ECAB 339 (1991).

²⁷ *Supra* note 9.

considered self-generated and not employment generated. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.²⁸

Appellant has not submitted sufficient evidence to show that his managers acted unreasonably in confiscating his computer or the interrogation. The confiscation of his computer and subsequent interrogation on August 15, 2012 were based on a hotline tip that he was conducting a personal eBay business during the time he was at work. Appellant has not shown that management's actions in connection with its investigation or confiscation of his computer were unreasonable. In an October 15, 2012 memorandum, Ms. Badger noted that a forensic report of his hard drive supported the allegation that appellant was conducting an eBay business while at work. The evidence does not establish that the employing establishment erred in these circumstances. Appellant presented no corroborating evidence to support that the employing establishment acted unreasonably in these matters. The employing establishment provided a reasonable explanation for its actions. Appellant has not established a compensable employment factor under FECA with respect to the investigation or confiscation of his computer.

Appellant contended that his anxiety and headaches were caused by overwork. He alleged an excessive workload and stress from performing his duties. In addition, appellant attributed his anxiety and headaches to the stress and increased responsibility due to managing people on and off the clock and managing air traffic. The Board has held that overwork may be a compensable factor of employment.²⁹ The Board finds, however, that appellant made only general allegations of overwork that are nonspecific and not supported by the evidence of record. The employing establishment denied that there had been any change in his responsibilities from July 18, 2010 until September 24, 2012, when he stopped working. However, appellant has not identified how he was overworked or provided any evidence supporting his allegation of either overwork or an excessive workload. He has not submitted sufficient evidence supporting his allegation of an excessive workload or overwork. The Board, therefore, finds that appellant has failed to establish a compensable factor under *Cutler*.³⁰

Consequently, the Board finds that appellant has not established any compensable employment factors.³¹

On appeal appellant's counsel argues that appellant's duties as an air traffic controller were directly responsible for his emotional condition. He also argues that all elements of entitlement under FECA have been met and thus, OWCP erred in denying his emotional condition claim. As discussed above, appellant failed to establish any compensable factor of

²⁸ See *S.M.*, *supra* note 12; *David C. Lindsey, Jr.*, *supra* note 20; *Richard J. Dube*, 42 ECAB 916 (1991); *Thomas D. McEuen*, *supra* note 9.

²⁹ *Peter D. Butt Jr.*, 56 ECAB 117 (2004); *Bobbie D. Daly*, 53 ECAB 691 (2002).

³⁰ *Supra* note 7.

³¹ As appellant has failed to establish a compensable employment factor, the Board need not address the medical evidence of record. See *L.K.*, Docket No. 08-849 (issued June 23, 2009); *V.W.*, *supra* note 4; *Alberta Dukes*, 56 ECAB 247 (2005); *Margaret S. Krzycki*, 43 ECAB 496 (1992).

employment with respect to his allegations. He submitted no supporting factual evidence supporting his allegations and thus, he has not met his burden of proof to establish any compensable factors of employment.

CONCLUSION

The Board finds that the evidence fails to establish that appellant sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 13, 2013 is affirmed.

Issued: November 14, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board